FILED
NOV 19 2007
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SUPREME COURT, U.S.

No. 07-159

IN THE
Supreme Court of the United States

CITY OF NEWPORT NEWS, VIRGINIA; DENNIS A. MOOK,
Petitioners,

v.

CHRISTOPHER A. SCIOLINO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI 1

I. THE DECISION BELOW CONFLICTS WITH *BISHOP v. WOOD* 2

II. THE FEDERAL CIRCUITS ARE DIVIDED OVER THE QUESTION PRESENTED HERE 3

III. THE QUESTION PRESENTED IS OF GREAT PRACTICAL IMPORTANCE TO STATE AND LOCAL GOVERNMENTS 9

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Bell Atl. Corp. v. Twombly,
127 S. Ct. 1955 (2007) 12

Bishop v. Wood,
426 U.S. 341 (1976) 1, 2, 3, 11

Brandt v. Bd. of Coop. Educ. Servs.,
820 F.2d 41 (2d Cir. 1987) 6

Burton v. Town of Littleton,
426 F.3d 9 (1st Cir. 2005) 5

Buxton v. Plant City,
871 F.2d 1037 (11th Cir. 1989) 8

Cartwright v. Wilbanks,
541 S.E.2d 393 (Ga. Ct. App. 2000) 9

Chabal v. Reagan,
841 F.2d 1216 (3d Cir. 1988) 6

Cooper v. Univ. of Washington,
2007 U.S. Dist. LEXIS 82969 (W.D. Wash. Nov. 8, 2007 8

Copeland v. Phila. Police Dep't,
840 F.2d 1139 (3d Cir. 1988) 6

Cox v. Roskelley,
359 F.3d 1105 (9th Cir. 2004) 8, 9

Johnson v. Martin,
943 F.2d 15 (7th Cir. 1991) 2

TABLE OF AUTHORITIES
(continued)

Page(s)

Mattia v. Del. River Port Auth.,
1996 WL 532487 (E.D. Pa. Sept. 20, 1996) 6, 7

Mosca v. Cole,
217 Fed. Appx. 158 (3d Cir. 2007) 6

Olivieri v. Rodriguez,
122 F.3d 406 (7th Cir. 1997) 5, 8, 9, 11

Phillips v. Minnesota,
725 N.W.2d 778 (Minn. Ct. App. 2007) 7

Swinton v. Safir,
720 N.E.2d 89 (N.Y. 1999) 9

OTHER AUTHORITIES

Jenny S. Brannan, Comment, *The Publication Debate in Deprivation of Occupational Liberty Claims*,
47 Kan. L. Rev. 171 (1998) 10

Nat Stern, *Defamed But Retained Public Employees: Addressing A Gap In Due Process Jurisprudence*,
31 Hofstra L. Rev. 795 (2003) 9

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The response brief brings to mind the Groucho Marx adage, "Who are you going to believe, me or your own eyes?" Our opening petition presented three grounds for review: (1) the decision below directly conflicts with the express language of this Court's decision in *Bishop v. Wood*, 426 U.S. 341 (1976); (2) the decision below deepens a long-standing and pervasive disagreement among the court of appeals; and (3) the decision below is of great practical importance to local and state governments. Pet. 10-27. As to the first point, respondent continues (Resp. Br. 18-20) to read *Bishop*'s "public disclosure" requirement to mean "no public disclosure" or, in Judge Wilkinson's words, to "wish[] for ambiguity where there is none." As to the circuit court disagreement, respondent sees only a "wafer-thin" dispute (Resp. Br. 8) despite numerous statements by federal and state appellate judges (and legal academics) describing the persistent circuit conflict presented here. And, as to the practical consequences of the decision below, respondent claims the circuit "conflict rarely makes any practical difference to governmental employers" (Resp. Br. 8), despite the amicus brief filed by six local and state organizations that explains how the personnel changes mandated by the decision below will significantly affect state and local governments. In short, respondent's answers disregard ordinary English, distort evidently conflicting case law, and ignore the perspectives of those best-placed to evaluate the significant impact of this case.

Certiorari is warranted.

I. THE DECISION BELOW CONFLICTS WITH *BISHOP v. WOOD*

In *Bishop v. Wood*, this Court held that a public employee who is dischargeable at will is not deprived of "liberty" when "there is no *public disclosure* of the reasons for the discharge." 426 U.S. at 348 (emphasis added). As the Court explained, if a "communication was not *made public*, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honor, or integrity' was thereby impaired." *Id.* (emphasis added). The natural – indeed, the only linguistically defensible – reading of those terms is that a terminated government employee's constitutional right to a name-clearing hearing arises only when the government *actually discloses* the basis for termination. *See* App. 24a.

Despite this clear language, respondent suggests that lower courts are free to authorize a due process lawsuit based on allegations that a government employer is "likely" to disclose stigmatizing allegations. Resp. Br. 18-19. But this Court's directions are not so easily evaded. Whether the reason for termination has been made public is quite different from whether the reason is likely to be made public at some future time. In Judge Wilkinson's words, the majority's claim – adopted by respondent – that *Bishop* "did not 'resolve the question'" "wishes for ambiguity where there is none." App. 24a. *Accord Johnson v. Martin*, 943 F.2d 15, 17 (7th Cir. 1991) ("Defining 'public disclosure' in a way which encompasses 'no public disclosure' is an exercise we choose not to embrace.").

Moreover, the substance of the decision below is directly at odds with the holding in *Bishop*. If the "likelihood of disclosure" standard adopted by the court below were the correct standard, the plaintiff in *Bishop* would have prevailed. As Justices Brennan and Marshall noted in their *Bishop* dissent, there was a significant likelihood that in the future the employer would have disclosed the reason for the employee's termination. *See* 426 U.S. at 352 (finding "no reason to believe that respondents will not convey these actual reasons to petitioner's prospective employers"). Needless to say, it is not the province of a lower court to overrule this Court's decisions.

Implicitly recognizing that the court below has overstepped, respondent places extraordinary reliance on a few instances whereby this Court has declined to grant petitions presenting similar questions. Resp. Br. 19. Of course, the reasons for a denial of certiorari are numerous and previous denials do not suggest that an issue is not worthy of this Court's attention. To the contrary, repeated petitions on a single issue may well indicate that the issue arises with sufficient frequency that review is warranted.

In short, respondent's brief fails to reconcile the conflict between *Bishop* and the decision below. Because the majority's decision conflicts with binding precedent of this Court, certiorari should be granted.

II. THE FEDERAL CIRCUITS ARE DIVIDED OVER THE QUESTION PRESENTED HERE

Judge Wilkinson starts his dissent from the decision below as follows: "There is at least one thing upon which the majority and I can agree: The cir-

cuits are split as to whether stigmatizing allegations can deprive a former government employee of a constitutional liberty interest before the allegations are disseminated to prospective employers or others." App. 18a. Three circuits – the First, Third, and Seventh – have followed *Bishop* and held that a government employer need not provide a name-clearing hearing to a terminated employee in the absence of actual public dissemination of the reasons for termination. Pet. 13-16. Seven circuits, however, impose a constitutional requirement that a government employer provide a hearing to a terminated employee even where the reasons for the termination have not been actually disseminated. The Second, Fourth, and Tenth Circuits recognize due process claims where the allegedly false and stigmatizing charges in a personnel file are "likely" to be disseminated to prospective employers. Pet. 16-18. Other circuits have adopted an array of varying but similarly permissive requirements. Pet. 18-20. In short, as Judge Wilkinson summarized, the question presented here not only implicates a "circuit split" but has "generated answers with shades and permutations that mock the clarity law must provide for human conduct." App. 20a.

1. In downplaying the scope of the disagreement among the courts, respondent primarily argues that only the Seventh Circuit, and not the First Circuit or Third Circuit, requires actual disclosure to support a due process liberty deprivation lawsuit. But we were far from the first to suggest this circuit court alignment. Both the majority and dissenting decisions below read those courts to require actual disclosure. App. 8a, 18a. Judge Posner has reached the same

conclusion. *See Olivieri v. Rodriguez*, 122 F.3d 406, 408 (7th Cir. 1997) ("Our court, however, insists on dissemination, *as do the First and Third Circuits.*" (citations omitted) (emphasis added)). A straightforward reading of the relevant decisions confirms these conclusions.

The First Circuit in *Burton v. Town of Littleton*, 426 F.3d 9, 17 (1st Cir. 2005) held that "the placement of damaging information in a personnel file, without further dissemination, is not sufficient to trigger the constitutional tort." Although plaintiff's termination letter in that case had been sent to the Commissioner of Education, that was insufficient evidence of publication because the court traditionally had only recognized truly public dissemination, such as "'at public meetings or to the press.'" *Id.* at 16 (quoting *Beitzell v. Jeffrey*, 643 F.2d 870, 879 (1st Cir. 1981)). As the court emphasized, "*Bishop* is concerned not with *hypothetical or merely possible reputational harms* to public employees, but with significant infringements on their liberty interests." *Id.* at 16 (emphasis added).

Respondent points to language in the court's opinion suggesting that the analysis might have been different "[i]f the Commissioner were obligated to release the document." Resp. Br. 9 (citing *Burton*, 426 F.3d at 17 n.6). But even if the court's aside could be read as a signal that it might find a liberty interest implicated when charges are placed in documents subject to mandatory disclosure under state law, that is a far cry from the broad and amorphous likelihood-of-disclosure standard adopted in the Fourth Circuit and elsewhere. *See, e.g., Brandt v. Bd. of Coop. Educ. Servs.*, 820 F.2d 41, 44 (2d Cir.

1987) ("what is sufficient to constitute 'public disclosure' will vary with the circumstances of each case").

Respondent's discussion of Third Circuit case law is also unconvincing. In *Copeland v. Philadelphia Police Department*, 840 F.2d 1139 (3d Cir. 1988), the court rejected plaintiff's liberty interest claim on the basis of his failure to demonstrate actual dissemination. Respondent argues *Copeland* is not on-point here because the plaintiffs did not allege a likelihood of dissemination. Not so. Plaintiff in that case had asserted that "the presence of information relating to his termination in his personnel file raises an inference that the *city intends to communicate this information to prospective employers*" – in other words, that the city was likely to so disclose. *Id.* at 1148 (emphasis added). Third Circuit authority is in conflict with the decision below. *See Mosca v. Cole*, 217 Fed. Appx. 158, 163 (3d Cir. 2007) (rejecting claim where "there is no evidence that [defendants] told anyone that [plaintiff] was terminated for" making inflammatory statements); *Chabal v. Reagan*, 841 F.2d 1216, 1223-24 (3d Cir. 1988) ("We have made it clear that a protected liberty interest is not implicated if the government did not in fact disseminate any allegedly stigmatizing information to the public.").[1]

Several state law appellate courts are also in line with the First, Third, and Seventh Circuits. For ex-

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[1] The district court decision relied on by respondent did not "read Third Circuit law as incorporating the likelihood-of-disclosure standard," but rather relied on a *Second Circuit* decision for the proposition that likelihood is enough. Resp. Br. 10. *See Mattia v. Del. River Port Auth.*, 1996 WL 532487, at *7 (E.D. Pa. Sept. 20, 1996).

ample, in *Phillips v. Minnesota*, 725 N.W.2d 778, 784 (Minn. Ct. App. 2007), the court found no deprivation of a liberty interest where defendant "did not make public either the letter informing [plaintiff] of [its] decision not to rehire him or the investigator's report substantiating the sexual-harassment allegation." *See* Pet. 15. Respondent claims that *Phillips* "did not involve stigmatizing information in a personnel file." Resp. Br. 11. But constitutional doctrine cannot turn on whether a stigmatizing allegation is placed in a personnel file as opposed to an investigation file. The *Phillips* plaintiff was fired for sexual harassment, and his due process suit was rejected because this stigmatizing reason for his termination was not actually made public. *Phillips* conflicts with the decision below.

2. Respondent does not dispute that the decision below is in accord with the decisions of the Second and Tenth Circuits. Thus, at a minimum, there are three circuits in disagreement with First, Third, and Seventh circuits.[2] But the disagreement is broader than that.

Although respondent states that the cases in the Fifth and Eighth Circuits are not internally inconsistent and in fact line up with the Fourth Circuit decision, Judge Wilkinson stated the opposite, describing

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[2] Respondent mistakenly claims that the decision below was "at best a restatement of existing Fourth Circuit law on the subject." Resp. Br. 15-16. The panel below explicitly recognized that its prior case law "d[id] not reach the question before [it]," App. 7a n.4, and for that reason looked to the other courts comprising the circuit split in analyzing the question. *See also* App. 8a ("neither *Bishop* nor *Ledford* resolve the question before us").

the Fifth Circuit's cases as being in "internal tension," App. 18a, and the Eighth Circuit cases as "not fit[ting] neatly" into the "camps" established by the other circuits, App. 19a. *See also* Pet. 19-20. Judge Posner similarly commented that the Fifth and Eighth Circuits "have hedged." *Olivieri*, 122 F.3d at 408.

Respondent also attempts to collapse the "public record" standard found in some jurisdictions into the "likelihood of disclosure" standard adopted by the court below. Resp. Br. 9. These standards, however, are not the same. The Ninth and Eleventh Circuits have held that a liberty interest is implicated only when the stigmatizing charges have been placed in documents that are public records as a matter of state law. *See Cox v. Roskelley*, 359 F.3d 1105 (9th Cir. 2004); *Buxton v. Plant City*, 871 F.2d 1037 (11th Cir. 1989). But the "public record" standard provides absolutely no guidance when the document in question is not a public record. *Compare Cox*, 359 F.3d at 1110 *with Cooper v. Univ. of Washington*, 2007 U.S. Dist. LEXIS 82969, at *23-24 (W.D. Wash. Nov. 8, 2007) (recognizing "split" and following "the rule adopted in the First, Third, and Seventh Circuits – that plaintiff must show that defendant publicized to the community or potential employers the grounds for plaintiff's dismissal"). Moreover, even if these courts could be construed as siding with the court below (and the Second and Tenth Circuits), the circuit court disagreement is merely that much starker.

* * *

As with the direct conflict with *Bishop*, there is no serious doubt that the circuits are divided on the question presented. In addition to Judge Wilkinson's explication below, courts and commentators have frequently recognized the longstanding and pervasive split of authority on this question. *See, e.g.*, *Cox*, 359 F.3d at 1115 n.2 (Hall, J., dissenting) ("other circuits considering substantially similar issues had reached diametrically different conclusions."); *Olivieri*, 122 F.3d at 408 (recognizing "inter-circuit conflict"); *Cartwright v. Wilbanks*, 541 S.E.2d 393, 396 (Ga. Ct. App. 2000) ("We recognize that the federal circuit courts are sharply and evenly divided on this issue."); *Swinton v. Safir*, 720 N.E.2d 89, 92 (N.Y. 1999) ("The Federal Circuit courts that have addressed the issue are almost equally divided.").[3] The Court should take this opportunity to introduce clarity to a confused area of constitutional law.

III. THE QUESTION PRESENTED IS OF GREAT PRACTICAL IMPORTANCE TO STATE AND LOCAL GOVERNMENTS

1. The question presented is of great importance to state and local government employers throughout the country. As petitioners' *amici* explain in detail, the rule adopted in the Fourth Circuit forces gov-

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[3] *See also* Nat Stern, *Defamed But Retained Public Employees: Addressing A Gap In Due Process Jurisprudence*, 31 Hofstra L. Rev. 795, 800 (2003) ("[F]ederal courts of appeals have split on whether stigmatizing material in an employee's personnel file must actually be disseminated to meet *Bishop*'s requirement of publication."); Jenny S. Brannan, Comment, *The Publication Debate in Deprivation of Occupational Liberty Claims*, 47 Kan. L. Rev. 171, 183 (1998) (discussing "sharp split of authority" among federal courts of appeals).

ernment employers to conduct substantially more hearings, exposes them to additional litigation and its attendant costs and burdens, and significantly undermines the value of probationary employment. *See* Brief of International Municipal Lawyers Association, International Public Management Association For Human Resources, Local Government Attorneys of Virginia, Inc., National League of Cities, National Public Employer Labor Relations Association, and Virginia Association of Counties as *Amici Curiae* in Support of Petitioners at 5-14. It also provides strong but perverse incentives to employers not to document the grounds for termination at all in order to limit their legal exposure. *See* Pet. 25-26.

For example, *amici* (at 3, 5-6) explain that the almost 90,000 state and local government units in the United States make widespread use of probationary employment. Probationary status is an efficient means of evaluating an applicant for permanent employment before granting the substantial protections of civil service status. *Amici* emphasize that any constitutional right to a name-clearing hearing most directly affects probationary employees because, unlike permanent employees, probationary employees may not otherwise expect a guaranteed hearing to appeal a discharge. Under the decision below, however, responsible public employers may feel compelled to provide a name-clearing hearing every time they terminate a probationary employee. Thus, advocating the "likelihood" standard "comes close to arguing that there is no such thing as proba-

tionary public employment." *Olivieri*, 122 F.3d at 409.[4]

In sum, the brief of local and state *amici* refute respondent's claim that the "practical difference" between the constitutional standards is "truly de minimis." Resp. Br. 15. The *amici* explain (at 8-9) that the "likely-disclosure standard would require employers to provide many more hearings than are required under the actual-disclosure standard"; that these "additional hearings are expensive"; and that the Fourth Circuit's standard will "impose other litigation costs" because it "would bring several vague standards into play every time a probationary employee is terminated." *See Amici* Br. at 11-12 ("the word 'likely' is so vague that its meaning cannot be stated in advance"; "amorphous 'stigmatizing standard'"; "sufficiency of procedure is governed by yet another fuzzy standard"). Just as the conflict with *Bishop* and among the Circuits is undeniable, the practical importance of the issue presented is beyond serious question.

2. Finally, there is no merit to respondent's "vehicle" arguments. Resp. Br. 23-26. The question that has divided the courts is a question of law – what elements must be pled, and ultimately proved, to sustain a claim that a government employee has been deprived of a liberty interest on the basis of stigmatizing charges accompanying his termination. No amount of discovery or further development of

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[4] Respondent notes that the City of Chicago opposed certiorari in *Olivieri*. Resp. Br. 17-18. But *of course* the city opposed further review in that case: it had prevailed in the Seventh Circuit, and the court had adopted the rule advocated here that actual disclosure is required.

the record will aid the Court in resolving that question. It is equally irrelevant that there are other defenses available to defendant on which it might prevail on remand. Resp. Br. 23. If petitioners are correct that respondent has not, and could not, plead the elements of a constitutional tort, then they are entitled to judgment now in order to avoid the cost and inconvenience of continued litigation. Indeed, the entire purpose of requiring parties to plead the elements of their claims is to save the parties the effort and expense of conducting discovery and other pre-trial litigation. *See Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1966 (2007) ("when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court'" (quoting 5 Charles Allen Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1216 (2d ed. 1987) (further citations omitted)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 19, 2007